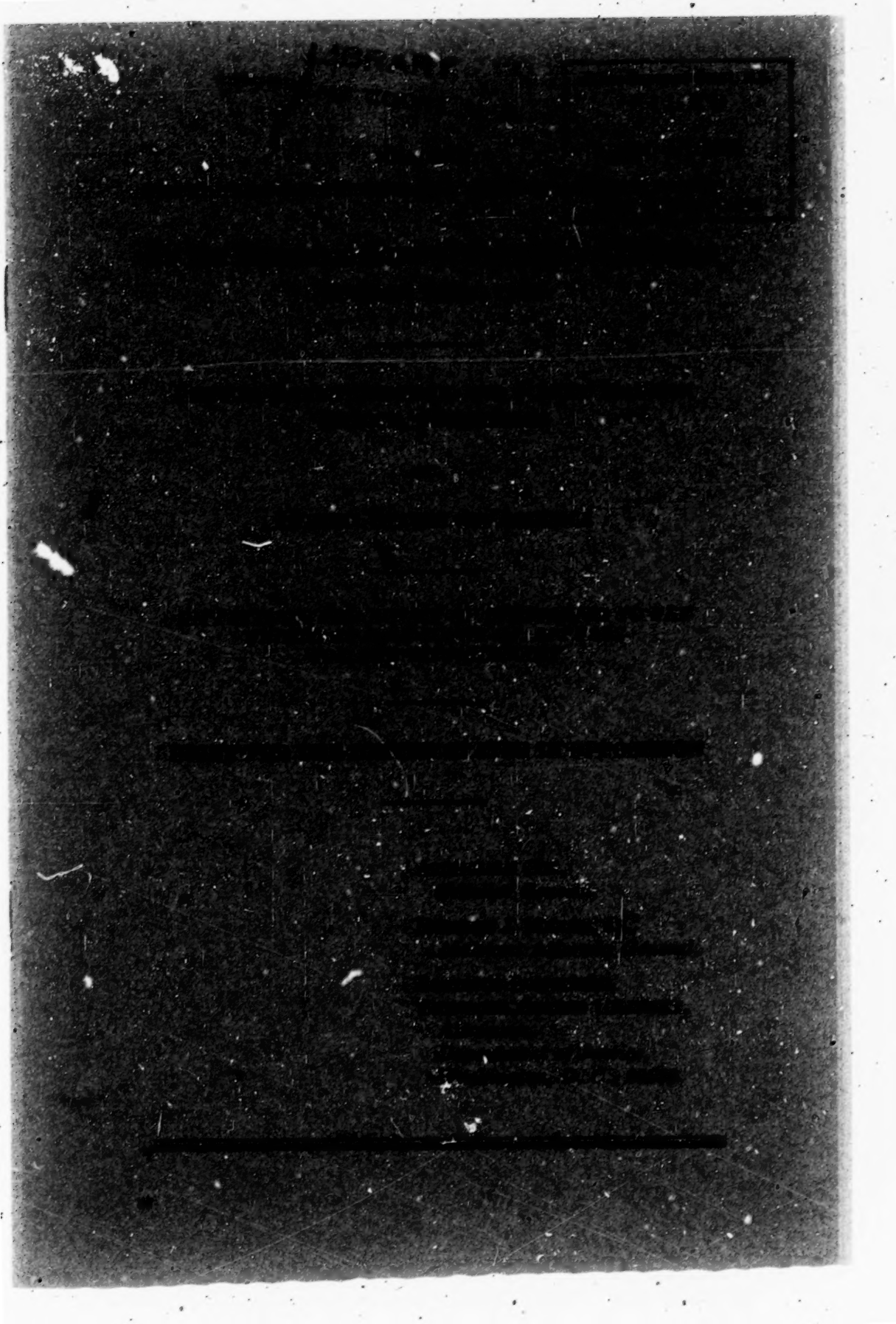

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1065

VERNON EVANS BERGMAN AND HENRY MADISON MYRICK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 17-23) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1963 (Pet. 16). A petition for rehearing was denied on February 19, 1964 (Pet. 24).

On March 9, 1964, Mr. Justice Black extended the time to file a petition for a writ of certiorari to April 19, 1964 (Pet. 25). The petition for a writ of certiorari was filed on April 15, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether verifax copies of microfilm bank records were admissible under 28 U.S.C. 1732.

2. Whether a bank draft in the face amount of $7,000 was of a value of over $5,000 under 18 U.S.C. 2314.

STATUTES INVOLVED

18 U.S.C. 2314 provides in pertinent part:

> 2314. Transportation of stolen goods, securities, monies, or articles used in counterfeiting.
>
> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; * * *

18 U.S.C. 2311 provides in pertinent part:

> 2311. Definitions.
>
> * * *
>
> "Value" means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof.

28 U.S.C. 1732 provides in pertinent part:

1732. Record made in regular course of business; photographic copies.

* * * *

(b) If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless held in a custodial or fiduciary capacity or unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence.

STATEMENT

Petitioners were both convicted by a jury, in the United States District Court for the Eastern District of Texas (R. 907), of securities fraud (Count I) and mail fraud (Count II). Petitioner Bergman was also convicted on Count IV charging interstate transportation of a bank draft of $7,000 which had been obtained by fraud, in violation of 18 U.S.C. 2314 (R. 115-116, 908). Both petitioners were sentenced to imprisonment for five years on Count I. In addition, petitioner Bergman was sentenced to a concurrent term of five years on Count II; and given a suspended consecutive sentence of five years on Count IV. Petitioner Myrick was sentenced to a suspended five-year consecutive sentence on Count II (R. 938, 940)[1]. The court of appeals affirmed the convictions (Pet. 16).

The evidence to support the fraudulent activities may be summarized as follows:

Petitioners, using the names of Soll Evans and Mike Myrick, sold worthless motel stock (R. 615, 630, 650), traded in worthless oil stock called American Rare Metals (R. 673-674, 679, 764, 770-771, 785, 788-790, 701-702, 711-712, 729) and sold stock in the Legal Life Insurance Company at exaggerated prices (R. 539, 558-559, 405, 406-408, 599, 609).

In particular, Mrs. Donald, who was the victim in Count I, was sold (for $1000) 16 shares of Legal Life

---

[1] The trial court entered a judgment of acquittal on Count III as to both petitioners and a judgment of acquittal on Count IV as to petitioner Myrick (R. 847, 842).

Insurance Company stock (R. 405-409) which was worth .50 to $1.00 per share (R. 599, 601, 609). During the period involved she "invested" $15,200 with petitioners at ten to twelve percent interest for which she received nothing (R. 412-413, 425, 469, 470). The use of the mails as to some of these investments was the predicate of Count I. She was sold stock in Motels Unlimited, Inc., for $1,010.00 upon which she received no returns (R. 414, 415, 650). She invested $12,962.00 with petitioners for so-called gold bonds and mineral interests and received nothing (R. 452-454). (A check for part of this "investment" forms the basis of Count IV).

Mrs. Holmes, the victim in Count II, purchased similar worthless insurance company investments (R. 348-359); purchased $1,100 worth of American Rare Metals stock for which she received nothing (R. 330-346); gave petitioners, for deposit in trust at 5 percent, various sums in cash which were never returned (R. 351, 369-370). The mailing on which Count II was predicated related to the check for a stock called American Trust bought for $1,250 and never delivered (R. 324-327).

ARGUMENT

1. There is no merit to petitioners' complaint that certain verifax copies of bank checks and records were admitted into evidence without proper foundation under 28 U.S.C. 1732. Section 1732(b) authorizes the admission of facsimiles—verifax copies—where the original or a copy of the original made in the

ordinary course of business is in existence and available for inspection under the direction of the court. These requirements were satisfied here.

All the verifax copies had been made from microfilm records kept in the ordinary course of business by the bank. The copies were verified and many were merely copies of items of which the original itself was in evidence. In one instance when one official of the bank stated on voir dire that the microfilm from which certain of the verifax copies had been produced was in the courtroom, petitioners did not pursue it any further (R. 229). It is clear from this and other perfunctory objections (R. 178-182, 265-267) that if any serious request had been made for the actual microfilm records, they would have been obtained and produced for inspection.

In any event, the original documents which formed the basis of each count were introduced into evidence. (Count I, Ex. 20, R. 425; Count II, Ex. 49, R. 321 and Ex. 78, R. 223; Count IV, Ex. 76, R. 157). Furthermore many of the verifax copies were taken from microfilm merely to show that the original had passed through the particular bank and the original documents, from which the microfilm was prepared, were themselves in evidence. *E.g.*, Ex. 86 is a verifax copy of a microfilm taken of original Ex. 20; Ex. 98 is a verifax copy of a microfilm taken of original Ex. 76;

All references to "Ex." in this brief refer to the government's exhibits which were marked at trial as "Plaintiff's Exhibit"—as will be seen in the original exhibits certified to this Court.

Ex. 83 is a verifax copy of a microfilm taken of original Ex. 78; Ex. 85 is a verifax copy of a microfilm taken of original Ex. 77. Insofar as these exhibits are concerned, petitioners' complaint that the microfilm was not produced in the courtroom is meaningless.

Toho Bussan Kaisha, Ltd. v. *American President Lines, Ltd.*, 265 F. 2d 418 (C.A. 2), cited by petitioners is distinguishable on its facts since there the plaintiff sought to show damages by copies of its own records. The court pointed out that in such cases there are dangers of "fraud" and "imposition" in the use of photostats prepared specifically for trial. 265 F. 2d at 424. No such conditions existed here where the government was relying not upon records of its own but of an independent bank. Moreover, the court in *Toho Bussan* pointed out that, although the originals were in the plaintiff's possession, the plaintiff had offered no reason why it could not have made them available upon the objection to the admissibility of the copies. Here, as noted, microfilm from which some of the verifax copies had been made was in the courtroom and petitioners never sought to inspect it.

2. Questions two and three of the petition relate only to Count IV and hence only to petitioner Bergman. They present related complaints, namely, that the trial court failed to submit to the jury the issue of whether the $7,000 bank draft involved in Count IV had a "value" of $5,000 or more—as required by the statute (Pet. 6-7, 10-11)—and that the indictment was fundamentally defective in that it failed to

allege that the $7,000 bank draft had a "value" of $5,000 or more (Pet. 7-8, 11-12). The short answer is that security as used in 18 U.S.C. 2314 is defined in 18 U.S.C. 2311 to include a bank draft or check and value is defined in that section as "the face, par or marked value, whichever is the greatest." Consequently, there was no occasion to determine the market value of a bank draft which the evidence showed was paid in the face amount of $7,000. See *United States* v. *Walker*, 190 F. 2d 481, 482-483 (C.A. 2), certiorari denied, 342 U.S. 868. Furthermore, since there were no objections to the instructions to the jury on this ground (R. 890-893, 903), petitioner has no standing to complain. Rule 30, F.R. Crim. P.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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